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STATUTES CITED

IN THE

Supreme Court of the United States

October Term, 1956

No. 12

UNITED STATES OF AMERICA, *Appellant*

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA

On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR THE INTERVENERS

QUESTION PRESENTED

The question is whether the conclusion of the Interstate Commerce Commission that the United States has not been subjected to unreasonable or discriminatory rates and charges is based on adequate findings, supported by substantial evidence, and otherwise lawful.

In the Notice of Appeal and in the Brief for the United States, p. 4, this question is limited to review of the issues of discrimination and unreasonable practice under Sections 2 and 1 (6) of the Interstate Commerce Act. One of the principal issues upon which the case was presented to the Commission and argued below, i.e., the violation of Section 6 (7) by reason of the railroads' alleged refusal to make refunds on Government shipments pursuant to their tariffs, has been abandoned.

STATUTES INVOLVED

The provisions of the Interstate Commerce Act upon which Appellant relies, 49 U.S.C. 1 (6), 2 and 6 (8), are set out in the Brief for the United States, pp. 2-3. Before the Commission and the District Court Appellant relied primarily upon 49 U.S.C. 1 (5), 2 and 6 (7), which deal respectively with reasonableness of rates, discrimination and adherence to tariffs.

STATEMENT

On September 20, 1954, the United States filed in the United States District Court for the District of Columbia a petition to enjoin, set aside and annul an order of the Interstate Commerce Commission, dated June 1, 1953, in *United States* v. *Aberdeen & Rockfish Railroad Company, et al*, 289 I.C.C. 49. (R. 7-25) The petition named the United States as defendant, pursuant to 28 U.S.C. 2322, and also the Interstate Commerce Commission. On motion, The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Norfolk & Western Railway Company were granted leave to intervene as defendants. (R. 29)

The proceeding before the Commission was commenced by complaint filed on November 20, 1951. (R. 39-42) The complaint alleged that since May 1, 1951, the railroads had refused to provide wharfage and handling of military

freight shipped for export* to the Norfolk Army Base Terminal or to absorb the cost of such services by paying allowances, i.e., refunds of a portion of the freight rates, to the United States or its agent, although the railroads through their agent rendered wharfage and handling services for commercial shippers. This was alleged to be in violation of Sections 1, 2, 3 and 6 of the Interstate Commerce Act, the sections requiring reasonableness of rates, equality of treatment and adherence to published tariffs. The Commission was asked to require defendants to make payment to the United States or its agent of allowances in the same amounts as the compensation paid by the railroads to their own agent for the wharfage and handling of commercial freight, that is, for providing a wharf where freight may be placed and for unloading freight from the cars. The complaint specifically designated the terminal tariffs under which payments were alleged to be warranted. (R. 41) These, as will be explained below, are not the line-haul tariffs publishing the export rates.

By report and order dated June 1, 1953, the Commission dismissed the complaint. 289 I.C.C. 49 (R. 7-25) Subsequently, reconsideration was denied. (R. 25) Upon review, the Statutory Court held "that the Commission's order of June 1, 1953, is supported by adequate findings; that these findings, in turn, are supported by substantial evidence in the record, particularly the testimony of plaintiff's own witnesses; that the record amply supports the finding that plaintiff has not been accorded different treatment from any other shipper under the same or similar circumstances and has not been subjected to any unlawful discrimination", and that the order was not otherwise contrary to law. 132 F. Supp. 34. (R. 33)

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* The complaint also included import, coastwise and intercoastal freight, but the evidence was limited to export freight. Complainant's witness admitted that the military shipments involved were not export shipments under customary tariff provisions but only under a special provision applicable to military bases (R. 211) and that the import, etc., rates had not been made applicable in similar manner. (R. 250)

1. Background of the Case

Appellant's statement of facts contained in pp. 4-12 of its brief seeks to create the impression that the railroads have undertaken in their line-haul tariffs to make an allowance out of their export rates of $1.00 per ton for the wharfage and handling of all export freight moving over the so-called Army Base at Norfolk, that the Army is entitled as a matter of law to these export rates, and that the railroads have arbitrarily and in violation of Sections 1 (6) and 2 of the Interstate Commerce Act refused to pay such allowance to the United States on its military freight while at the same time paying it to commercial shippers on commercial freight. This, of course, is not at all the factual situation as both the Commission and the Statutory Court have recognized.

Ordinarily the unloading of freight and, in the case of export freight, the providing of piers are obligations of the shipper and not of the railroads, except to the extent that the railroads in their tariffs voluntarily assume these obligations. Where the railroads assume this burden at all, they do so only at railroad piers where they perform the services themselves or at public terminals where they perform them through an agent who is compensated at a rate agreed upon by the agent and the railroad. The railroads never perform these services or pay allowances to shippers for their performance at private piers belonging to the shippers. (R. 220, 294) Appellant's testimony is in accord. (R. 247-8) This difference in treatment is not unlawful so long as all shippers are treated alike. *Barringer & Co.* v. *United States*, 319 U.S. 1, 13.*

At Norfolk the railroads provide certain railroad piers where export freight can be delivered to steamships and under certain conditions the railroads unload the freight from the cars. They do not provide all of the piers or un-

* The absence of discrimination is clearer in this case than in *Barringer*. See footnote, *infra*, page 8.

load all export freight but assume these obligations only within limitations specified in their tariffs.

In addition to performing this service themselves on their own piers, the Norfolk lines prior to May 1, 1951, provided in their terminal tariffs that they would also perform them at the so-called Army Base, a large marine terminal owned by the United States but leased to Stevenson & Young, Inc., a public wharfinger which operated it as a public pier.* By agreement this firm acted as agent for the Norfolk railroads in providing an additional railroad facility at the Army Base, including, among other things, the unloading of the freight that the railroads were obliged by their tariffs to unload, and the railroads compensated Stevenson & Young in accordance with the amount of railroad freight actually handled in the railroads' behalf. By agreement the compensation was fixed, at least at the time the complaint herein was filed, at 25 cents per ton for wharfage and 75 cents per ton for unloading. Although these payments are sometimes loosely referred to as allowances, they are not such within the meaning of the Interstate Commerce Act but are merely compensation to an agent of the railroads which could be measured in any other manner (R. 173-4) and which is not subject to I.C.C. regulation.** Allowances under the Act are refunds of a portion of the freight rate to a shipper for performing part of the rail-

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* The agency agreement covered more than the providing of wharfage and handling services. It included in addition such services to the railroads as collection of freight charges, indemnification from claims for loss or damage to freight, indemnification from certain claims for negligence, and the duty to perform all duties and obligations of the railroad with respect to the freight in question. The agreed compensation to Stevenson & Young, although measured in terms of wharfage and handling, actually covered all of the services performed by Stevenson and Young as the railroads' agent. (R. 479-82) Yet Appellant seeks the same compensation.

** *Handling Freight Between Ships and Cars at Ports*, 253 I.C.C. 371. Complainant's witness admitted the difference between allowances and payments to a railroad agent. (R. 190, 255) In 1948, the Commission suggested that the payments should not be published in tariffs at all. (R. 301-2)

road transportation obligation. None of the tariffs here involved provided for the payment of allowances under any circumstances whatever. (R. 220)

It should be emphasized at this point that two different kinds of tariffs are discussed in this case, the export rate tariffs published by the line-haul carriers, and the terminal tariffs published only by the railroads serving the Port of Norfolk. The only reference to any obligation with respect to wharfage and handling services will be found in the terminal tariffs, *not* the rate tariffs. For example, the terminal tariff of the Pennsylvania Railroad, which was used as representative by complainant's witness (R. 205) and quoted in the Commission's report at 289 I.C.C. 58 (R. 16), provides that wharfage and handling services will be included in the export rates *only* when (1) export freight is delivered to vessels at the public terminal operated by Stevenson & Young, Inc., and (2) when the terminal operator actually performs the services in behalf of the railroad. The terminal tariffs make similar provision for the services on other piers but always limited to railroad or public piers and to actual performance by the railroads or their agent, and they never provide for the payment of allowances to shippers.

The brief of the United States is somewhat vague as to what the Government considers the obligation of the railroads to be at the Army Base Pier under these terminal tariffs. At some points, i.e., p. 40, the Government says the tariff obligation was "to absorb the cost of such services".* Yet, at another point, p. 24, it concedes that

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* The method by which the railroads absorb the cost under the tariffs is significant. The Army Base is served by a terminal switching carrier, the Norfolk & Portsmouth Harbor Belt Line, which publishes charges for wharfage and handling. The tariff containing such charges is Exhibit 31. (R. 486) The Norfolk railroads, for which the switching is performed, state in their terminal tariffs, subject to certain conditions, that they will absorb the Belt Line charges or that the charges will be included in the freight rate. (R. 16) The Belt Line charges were not assessed against Army shipments because the services were not performed.

if the carriers are obligated to perform the services themselves or to provide the service without reference to cost, the drastic changes in operating procedures on the piers following the Army's taking them over would be significant. Actually, of course, the terminal carriers undertook under the strict limitations provided in the terminal tariffs to perform wharfage and handling services through an agent whose compensation was the subject of agreement between such agent and such terminal carriers. They did not undertake to pay allowances to shippers who chose not to avail themselves of the railroads' services.

No obligation relative to wharfage and handling is contained in the export rate tariffs which publish the line-haul rates. Those tariffs, in which railroads not reaching the port participate, state what the export rates are and when they apply, but they give no indication, specifically or by implication, that free wharfage and handling services will be accorded. Although the railroads participating in the export rate tariffs have been joined as parties defendant to this action, those other than the terminal carriers have never participated in the action for the very good reason that they are not concerned with the wharfage and handling problem. (R. 243)

While Stevenson & Young operated the Army Base as a public pier, military shipments were treated like any other shipments and were accorded the free wharfage and handling service in behalf of the railroads if they qualified under the terminal tariffs. On May 1, 1951, however, the United States terminated Stevenson & Young's lease and took over the Army Base for military operation. Part of the facility was turned over to the Navy and thereafter the Navy provided its own piers and unloaded its own freight, and its shipments are not involved in this controversy. Another part of the facility was turned back to Stevenson & Young for continuation of its business as a public wharfinger. The usual railroad arrangements

were maintained as to freight thus handled by Stevenson & Young as public wharfingers, and all shippers, including the United States, were entitled to the same free services as previously. The balance of the Army Base was taken over by the Army for its exclusive use and shipments consigned to the Army were directed by the Army to be delivered to this facility and into the possession of the Army. The issue in this case is whether the Army is entitled to the same compensation for thus providing its own wharf and unloading its own freight as is paid to Stevenson & Young under contract as agents for the railroads. The Commission decided that it was not.*

At the outset, it should be noted that the Army could have continued to receive the free services without interference from anyone. If it had not found it necessary to operate its own private terminal at the Base and had not displaced the railroad agent, thus taking control of its freight from the railroads, there would have been no problem. The railroads continued to provide ample wharfage and handling services in Norfolk, both at other public piers and on that portion of the Army Base operated by Stevenson & Young as a public terminal, where Army shipments could have been handled without cost to the Army. In this case, however, the Army insists upon the right to operate its own wharfs but to be compensated therefor by the railroads, and the right to have its shipments unloaded under its direction and control, but with compensation from the railroads. Appellant's witness admitted that the railroads do not pay allowances to other

* In *Barringer & Co.* v. *United States, supra,* a Commission order was affirmed holding that free loading could be accorded some shippers to meet truck competition and not to others where competition was not a factor. Thus, some shippers through no fault of their own were obliged to pay for identical loading service received without charge by others. At Norfolk, all shippers may secure the free port services. It is entirely within their control whether they take advantage of the privileges or prefer to use their own facilities.

shippers under such circumstances and that they render the services only on public piers. (R. 247-8)

The theory of the case presented by Appellant to the Commission was not the same as the theory now presented to the Court. Before the Commission Appellant contended that there was no significant change in the Army Base after May 1, 1951, and that Stevenson & Young, the railroad agent, continued to operate the Base as a public terminal, although subject to supervision of the Army. Consequently, Appellant contended that its shipments actually moved through the public terminal (R. 204, 206) and met the requirements of the terminal tariffs as export freight handled "over wharf properties owned or leased by Norfolk Terminals Division of Stevenson & Young, Incorporated, and operated by Norfolk Terminals Division of Stevenson & Young, Incorporated, as a public terminal facility of the rail carriers and finally when Norfolk Terminals Division of Stevenson & Young, Inc., acting in the capacity of a public wharfinger, furnishes wharfage facilities and performs handling services for account of and as agent for the rail carriers on traffic that is neither consigned to or from, nor owned or controlled by Stevenson & Young, Inc." (R. 205) Complainant's argument along this line is fully set out in the Commission's report, 289 I.C.C. 59-61. (R. 17-18)

Now Appellant presents an entirely different theory to the Court.* In its Brief no reliance is placed on the theory "that the allowances are a matter of right, under the tariff provisions of the terminal lines". (R. 208) Appellant now argues that the export rates themselves in-

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* Although the Brief for the United States continually asserts, e.g., pp. 13, 17, 19, 23, 41, that the Army employed the same "terminal operator", the Army did not employ Stevenson & Young, Inc., as a terminal operator but as a labor contractor. (R. 164) Furthermore, the Army discontinued the services of Stevenson & Young, Inc., on January 1, 1953, but Appellant gives no explanation as to how this affects its theory of the case.

clude the wharfage and handling services (contrary to the testimony of its own witness, (R. 248-9, 251)) and that since the service was provided by the Army, it is entitled to allowances to avoid discrimination.

2. Findings and Conclusions of the Commission

(1) It is not the legal duty of the railroads to provide wharfage service, i.e., piers where export freight may be unloaded, but they do provide ample wharf facilities at Norfolk for all export traffic, including Army shipments, if the Army desires to use the public piers. 289 I.C.C. 61, 63. (R. 19, 21) The adequacy of such facilities was proved by the railroads (R. 337-8, 340, 341-2) and not disputed by Appellant. Appellant admitted that the railroads have no duty to provide piers. (R. 257-8, 266)

(2) To the extent the railroads provide wharfage they do so by furnishing the piers, and in no event pay allowances to shippers who prefer to use their own facilities. 289 I.C.C. 61. (R. 19) This finding is not only supported by railroad testimony but was admitted by Appellant. (R. 247-8) Since allowances must be published in tariffs, this is a matter within the knowledge of the Commission.

(3) To the extent the railroads undertake to provide wharfage, they have the right to supply the facility and cannot be required to pay allowances to shippers who prefer to use their own facilities, i.e., to hire the shippers' piers. 289 I.C.C. 65. (R. 23)

(4) The nature of the Army shipments in question was such that they would not normally be entitled to the export rates, and they became entitled to the export rates only by virtue of a special tariff provision applicable only to traffic moving over Army Bases. 289 I.C.C. 63. (R. 21) This was admitted by Appellant's witness (R. 250-1) and it precludes any notion that the railroads were still obliged to furnish the piers, i.e., wharfage, since the export rates

thus given to the Army apply to the type of traffic here involved only where it moves over *Army* piers.

(5) Since the Army, by taking control of the part of the Base over which its traffic moved, prevented wharfage service by railroads, any obligation was terminated that might otherwise have existed. 289 I.C.C. 64. (R. 22-3) Appellant contended that Stevenson & Young, the railroad agent, was still in charge of the Army Base and thus entitled to the contractual payments for supplying wharfage, despite the testimony of Appellant's witness, Colonel Weed, (R. 62-3) and the documentary evidence to the contrary. Appellant's operating witness testified "On Army traffic my Company is a labor contractor instead of a terminal operator" (R. 164) and "I do not see how it could have been done otherwise". (R. 178) He explained that the customary service of a public terminal operator would not have satisfied Army requirements.

(6) It is not ordinarily the duty of a railroad to unload freight (handling) but the railroads at Norfolk unload certain freight subject to definite tariff limitations. Two of these tariff limitations are significant in this case: (1) That the railroads actually perform the services and do not pay allowances to shippers for doing so; and (2) that they do so only on railroad or public piers and not on piers controlled by the shippers. 289 I.C.C. 58. (R. 15, 16) This finding is supported by the testimony of the various railroads (R. 219, 220, 237-9, 245, 293-4, 300, 314, 334) and admitted by Appellant's witnesses. (R. 247-8) Even on public piers, contrary to the statements on page 30 of Appellant's brief, free wharfage and handling do not apply to freight owned by a public terminal operator. (R. 171-2, 483)

(7) Beginning May 1, 1951, in lieu of using public piers where railroad handling was available, the Army took over the major portion of the Army Base, took possession of its own freight, subjected some of it to processing and

other treatment, destroyed its identity as export freight, and otherwise exercised complete dominion over its own shipments. 289 I.C.C. 56, 57, 60. (R. 14, 15, 18, 19) Appellant's own witness supplied the supporting testimony. (R. 168-9, 177-9)

(8) Under similar circumstances, no other shipper would be entitled to the free loading privileges or even to the export rates accorded the Army. 289 I.C.C. 61, 63. (R. 19, 21) This was admitted by Appellant's witnesses. (R. 168, 172, 248, 250-1)

(9) Accordingly, the Army was treated exactly like any other shipper with respect to the wharfage and handling services, and was not discriminated against. 289 I.C.C. 61. (R. 19)

(10) The railroads were not obligated to meet the special Army requirements for handling freight, customary railroad handling service would not have been acceptable to the Army, and by reason of its special requirements, the Army prevented the railroads from performing the service. 289 I.C.C. 64. (R. 22, 23) Appellant's evidence shows that the railroads would have had to operate subject to Army control and direction (R. 78, 81, 123-4), that the usual type of terminal operation could not be permitted (R. 52), that Army control was necessary (R. 178) and that the difference in the special service required was such as to increase the cost from 75 cents per ton to $2.87. (R. 178-9, 198-9)

(11) The terminal tariffs, which are the sole sources of any wharfage or handling obligation, neither authorize nor require the payment of allowances on the Army shipments involved, 289 I.C.C. 60-61, 64, (R. 18-20, 22, 23), and thus no violation of Section 6(7) was proved. Appellant's tariff expert admitted that the alleged obligation depended on the terminal tariffs. (R. 248, 249, 251)

(12) The line-haul rates are not unreasonable when the wharfage and handling services are not accorded. 289

I.C.C. 63-6. (R. 21-24) Appellant's witness admitted that the rates are made without consideration of the wharfage and handling services (R. 251-2, 254) and that the line-haul carriers, which publish the export rates, have no participation in the port services. (R. 248) The public terminal operator admitted that he performed the services only for the terminal lines. (R. 171) The record shows that the line-haul rates could not possibly contain any element of cost or charge for the port services and are the same whether or not free wharfage and handling services are supplied. (R. 220-2, 236-7, 244-5, 316-7, 331-2)

(13) Appellant, instead of being treated unfairly, had been given advantages which would have been unlawful in the case of any other shipper, to wit: (1) The Army received the export rates by special concession, whereas other shippers under similar circumstances would have been obligated to pay the higher domestic rates; and (2) the Army was given extra switching services for which any other shipper would have been obligated to pay tariff charges. 289 I.C.C. 55, 63. (R. 13, 21-2) Appellant's transportation witness admitted that the export rates would not be applicable except for the special tariff provision in favor of Army and Navy Bases. (R. 250-1)

(14) In addition to the foregoing matters, the Army's method of requiring and accepting delivery short of unloading point terminated any further obligation of the railroads, and the railroads were thus relieved of any obligation they might otherwise have. 289 I.C.C. 65. (R. 23-4) This finding disposes of the case regardless of the other issues. It is supported by the discussion at pages 55-7 of the report (R. 13-15), which was based largely on Appellant's own evidence. (R. 141-2, 144-5, 146-159, 163-4)

(15) The rates and practices in question are not unjust, unreasonable, discriminatory or otherwise unlawful, and the complaint should be dismissed. 289 I.C.C. 66. (R. 24)

SUMMARY OF ARGUMENT

Appellant seeks the payment of allowances on Army freight shipments, although the railroads pay no allowances to other shippers for wharfage and handling services. Thus there is no discrimination in the payment of allowances. The railroads provide piers where export shipments may be delivered to vessels without assessing any charge (wharfage) therefor, and such piers are open to all shippers alike, including the Army. Thus, there is no discrimination in wharfage service. However, the Army does not use or desire to use the railroad piers but operates its own facility to which Army shipments are consigned. Appellant seeks to force the railroads to pay the Army an allowance for supplying its own piers, although admitting that the railroads have no legal obligation to provide piers as a part of the transportation service. On Appellant's theory, the Army would be the only shipper, among many large shippers who supply their own piers, to receive an allowance for wharfage.

Appellant asserts that the railroads do not "physically" accord wharfage but only make payments to their agents therefor, arguing that the railroads will be no worse off if they pay the Army. Actually the railroads supplement their own facilities by renting pier space from a public terminal operator who acts as their agent in this and other matters under contract. (R. 479-482) The agreed rental is measured by the amount of rail freight handled, 25 cents per ton, but the rent could be on a monthly or any other basis. It is wholly a matter of agreement between the railroad and its agent, not subject to regulation by the Commission. Before the Commission the Army contended that its shipments moved through the railroad agency, that the railroads were thus obliged to provide the use of their piers for Army shipments and that the railroad agent was entitled to the stipulated payments. The Commission ruled otherwise on the facts and this argument has been abandoned on appeal. Appellant now contends only that

it is discriminatory and unreasonable not to pay the same compensation to the Army.

It is well established in law that a railroad has the right to supply any facility or service within its transportation obligation, and that a shipper has no right to interpose his own facilities or services and to demand an allowance. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U.S. 199. In many prior wharfage cases, cited below, the Commission has held that the railroads are not obliged to hire the wharves of shippers.

The railroads undertake to unload certain export shipments on their own piers, whether operated by employes or agents, and at Norfolk they pay the terminal agent 75 cents per ton for this service. The service is available to the Army on the same terms as any other shipper on all railroad facilities, including that portion of the Army Base controlled by the railroad agent. Thus there is no discrimination in the unloading service. However, the Army does not use the public terminal but requires the delivery of its shipments into its possession, demanding the same compensation from the railroads as their agent receives. Before the Commission the theory was that the shipments were actually unloaded by the railroad agent, who was thus entitled to payment from the railroads, but the Commission held that the facts were otherwise. The Commission's finding that no other shipper receives either the service or an allowance on his own piers is not disputed. On the contrary, as the Commission stated in this case, in line with many prior rulings, any other shipper taking possession of his own export shipments at the port would not even be entitled to the export rates. The Commission has consistently held that it is not unlawful for the railroads to provide services on their own facilities on freight held in their possession which they do not provide elsewhere on freight delivered into the possession of a shipper, even though the same line-haul rates are charged.

The Army, although it takes delivery at the port, is accorded the export rates by a special tariff provision applicable to shipments moving over Army and Navy Bases. This language of itself precludes any notion that the railroads will provide wharfage.

Appellant contends that the export rates include wharfage and handling and, consequently, the Army pays for services not received, thereby unjustly enriching the railroads. The Commission held on uncontroverted evidence that no compensation is included in the rates for the services and thus, in a realistic sense, the services are free. In a long line of cases the Commission has held that the rates are not unreasonable when the services are not rendered, and that they are not discriminatory by reason of the restriction of the services to railroad facilities. It has held that equal treatment is accorded when the railroad facilities are open to all shippers and that equality does not require refunds to shippers who handle their own freight.

The Appellant's theory that the export rates include the services derives from the so-called terminal tariffs of the Norfolk railroads. The Belt Line Railroad, an agency of the Norfolk lines, publishes charges for wharfage and handling, which are in addition to the rates and which are in the same amounts as the compensation paid to the railroad agent at the designated facility. The terminal tariffs of the Norfolk lines state that on shipments handled through the designated facilities these charges will be absorbed, or that they will be included in the rates. This is merely a way of saying that the services will be accorded by the railroads at the designated facility and it is only in this sense that the rates cover the services. Any presumption that the rates have been inflated to cover the services is disproved by evidence of record. The export rate tariffs make no mention of wharfage or handling.

The Commission concluded not only that the Army was not subjected to discrimination but that it was actually favored with rates and switching services that could not lawfully be accorded other shippers under similar circumstances. This finding was not made to counterbalance illegality in other respects, but to show that the railroads went beyond their legal obligation in cooperation with the Army.

The Commission further held that, wholly apart from the foregoing, the Army was not entitled to the services or allowances. On the evidence that the shipments were consigned to the Army at Norfolk, that they were delivered to placement tracks designated by the Army, and that the Army thereupon took delivery of its freight, the Commission held that the transportation obligation was ended. The *Terminal Switching* cases supported this conclusion. *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402; *United States* v. *Wabash R. Co.*, 321 U.S. 403; *United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186. The principle established in these cases applies to shipments intended for transshipment. *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368; *Jarka Corporation of Baltimore* v. *Pennsylvania R. Co.*, 130 F. (2d) 804.

The question in these cases was the same as that raised by Appellant, i.e., whether the shipper paid for more service than he received. The cases stand for the proposition that the same line-haul rates may cover more terminal service in one situation than in another, and that this is a question of fact for the Commission.

ARGUMENT

I. UNDER ESTABLISHED PRINCIPLES OF JUDICIAL REVIEW THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED

It is well settled that an order of the Commission is subject only to limited review in the courts and that the case is not to be heard and decided on its merits *de novo*. If the Court determined (1) that the Commission made findings sufficient to indicate the basis for its conclusions, (2) that such findings are supported by the record, and (3) that the Commission has not misapplied law, the power of review is exhausted. The Court "will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling." *Interstate Commerce Commission* v. *Union Pacific R.R.*, 222 U.S. 541, 547.

The principle was stated in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139-140, as follows:

> "Even when resort to courts can be had to review a a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

As noted by Chief Justice Stone in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 681, fn. 1:

> "It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight."

The issue of discrimination depends primarily upon a factual determination which must be made by the Commission. "In any case findings of discrimination or undue preference under Secs. 2 and 3 (1), as we have said, are for the Commission and not the courts". *United States* v. *Wabash R. Co.*, 321 U.S. 403, 411. The Commission determined as a fact that the Army has not been subjected to discrimination, and the reviewing court found that this conclusion is adequately supported by evidence. In such circumstances, the statement of this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490, is applicable:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

The opinion of the statutory court in the instant case shows that it neither misapprehended nor misapplied the proper standard of review. This Court, to all practical purposes, is now asked to re-examine the record and to review the evidence and to determine issues of fact in order to determine whether the statutory court was correct.

II. THE COMMISSION'S CONCLUSION THAT THE RAILROADS ARE NOT OBLIGED TO PAY ALLOWANCES FOR WHARFAGE AND UNLOADING IS SUPPORTED BY THE EVIDENCE AND NOT VITIATED BY ERROR OF LAW.

Before dealing with the specific issues, interveners believe it is important to point out that the matters involved in this case have a long history, that they have been regulated by the Commission throughout its entire existence, and that they present factual questions which are within the peculiar competence of the Com-

mission. For example, the basic theory of export rates is a technical subject that has been developed through sixty-five years of Commission regulation, and the questions whether export rates apply at all, whether, even if applicable, they automatically include wharfage and handling services, and whether wharfage and handling must be provided at all piers whether private or public are matters having a comprehensive background of Commission consideration.

1. The Commission's Conclusion That the Export Rates Did Not Include Wharfage and Handling Services Is Supported by the Evidence

A basic misconception in Appellant's brief is found in its insistence that the wharfage and handling services, although admittedly not referred to in the export tariffs, are somehow included among the services for which the export rates are charged under such tariffs. The Commission concluded that the export rates do not automatically include wharfage and handling services and its conclusion in this respect is correct and soundly grounded in long-established tariff practice and procedure.

Every Commission decision of the past sixty-five years dealing with the subject of wharfage and handling charges has emphasized that they are not inherently incident to export rates, which remain the same whether or not wharfage and handling services are provided, but rather exist only where they are explicitly provided for in tariff provisions which clearly define and limit their application. A review of the Commission decisions on the subject makes this abundantly clear, and it is admitted by Appellant's own witnesses in the instant case, (R. 251-2, 254-5).

Thus, in *Norfolk Port Commission* v. *Chesapeake & Ohio Ry. Co.*, 159 I.C.C. 169 (1929), the Chesapeake and Ohio Railway was required to apply the export rates to Commercial freight moving over the Army Base then operated as a public terminal, *but not the wharfage and handling*

services. This is a clear holding that the export rates do not include these services." The Chesapeake and Ohio publishes the same export rates to the Army Base as the other railroads, but, as admitted by complainant's witness, it does not provide wharfage and handling. (R. 206-7) The complainant names no C. & O. terminal tariff, although designating the tariffs of the other Norfolk lines. Appellant erroneously seems to infer, Brief for the United States, p. 24, that the *Norfolk Port Commission* case is distinguishable because the C. & O. performs the services itself instead of employing a terminal operator. So it does at its own piers, just as the other railroads perform the services themselves at theirs, but at the Army Base the C. & O. was not required either to perform or pay for the services, although it was ordered to publish the export rates.

In *City of Newark* v. *Pennsylvania R. Co.*, 182 I.C.C. 51 (1932), the Commission held that it was prejudicial to the Port of Newark to withhold the handling service on railroad piers in Newark while performing such service on railroad piers at certain other ports, but the prejudice was removed by discontinuing the free service at the other ports. See *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I.C.C. 463, 469 (1938). This again indicates that the export rates do not necessarily include the port services since the rates remained the same despite the discontinuance of the services. To the same effect, see *Borough of Edgewater, N. J.* v. *Arcade & Attica R. Corp.*, 280 I.C.C. 121, 125-6 (1951), where the Commission said concerning the extension of export rates to certain industrial piers:

> "A distinction, however, in the application of the [export] rates to industrial piers which the railroads do make is that, while at railroad or other public piers they unload or load the cars, or absorb the cost thereof, in no event do they perform such service, or absorb its cost, on traffic of industrial pier owners, delivered, or received, at such piers. *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I.C.C. 463, 472-473. It will

be understood that, in their application to industrial piers, our findings observe and embody such distinction."

In *Interchange of Freight at Boston Piers*, 253 I.C.C. 703 (1942), the Commission held that the railroads are not obliged to pay for or maintain piers not owned by them, i.e., wharfage. The *Norfolk Port Commission* case, *supra*, contains similar language. Likewise in *Patterson* v. *Aberdeen & Rockfish R. Co.*, 266 I.C.C. 45 (1946), the Commission held that the Government was not entitled to a wharfage allowance for supplying its own piers.

In *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, *supra*, although deciding the case on another point, the Commission summarized applicable principles as follows, pp. 472-473:

"Under the present tariffs the rail carriers undertake to load and unload water-borne freight only at railroad or public piers, but in no event at piers controlled by the owners of the freight. At Baltimore the services are performed only at railroad piers, at Camden, Wilmington and Trenton only at municipal piers, at Philadelphia at either railroad or municipal piers or at privately owned piers which are operated as public piers, but in no case will the service be performed at piers controlled by the owner of the traffic. At Chester the services are performed at a railroad facility and at the pier of a warehousing company, which is operated as a public facility, but the services are not performed on freight in which the warehousing company or its owner has an interest. * * *

"The policy of defendants has been to restrict the port practices as much as possible, consistent with adequate service. Piers other than railroad piers are used only when necessary to supplement railroad facilities. In no case is the transfer service performed at a pier controlled by the owner of the traffic. The reasons for this policy are the difficulty of policing the practice, the necessity of performing the handling at the rail carrier's own convenience, the economy re-

sulting from the concentration over a limited number of piers, and the conservation of revenue. For example, freight coming into the possession of the owner is regarded as domesticated and is not entitled to the privileges accorded water-borne freight. Ordinarily carriers cannot handle freight over private piers at their convenience and economical handling cannot be achieved if freight is widely dispersed over many piers. Defendants are fearful that if they are required to perform the transfer services at the piers of Atlantic Terminals, Incorporated such action will result in extension of the practice beyond reasonable bounds. They show that there are numerous companies at Port Newark and other ports with private facilities along the water front which, by the formation of a pier company or public terminal, would be in a position to demand the performance of the transfer services. At the time of the hearing a new terminal company had been formed to operate on the property of a large shipper at Port Newark and had sought an extension of railroad services to its piers."

In *Chamber of Commerce of City of Newark, N. J.*, v. *Pennsylvania R. Co.*, 206 I.C.C. 555 (1935), the Commission had held prior to the *Weyerhaeuser* case that the railroads are not required to unload export freight on piers controlled by the shipper. Thus, in three different cases dealing with the port services at the Port of Newark, (the *City of Newark* case, the *Weyerhaeuser* case, and the *Chamber of Commerce* case, all *supra*), the Commission adhered to the rule that the port services are not automatically covered by the port rates and are not accorded shippers who exercise dominion over their own shipments. In all instances, the export rates themselves remained the same.

Elimination of New York, New Haven & Hartford Railroad Pier Stations, 255 I.C.C. 305 (1943), cited at page 30 of Appellant's brief, provides an interesting parallel to the existing situation at Norfolk. As appellant states, it was there proposed to discontinue the terminal service at a government-owned pier, because the pier was used to

such an extent for Military freight that only a limited degree of commercial traffic could be handled. The Commission declined to permit the withdrawal of the terminal services on commercial freight handled over the public terminal *but it did not require the unloading of military freight on the Navy portion.* The situation at Norfolk since May 1, 1951, has conformed exectly to that ruling, the railroads continuing to provide the service at the public terminal on the Army Base but not on piers controlled by the Army.

Finally, since this action was filed, the Commission has again decided the prior Norfolk case, frequently referred to in Appellant's brief, which deals with the Army Base operation during World War II. In accordance with the decision of the Court of Appeals in 198 F. (2d) 958, the Commission assigned the case for further hearing, and inasmuch as the case had originally been tried during the war when full information was not permitted, the defendants at the further hearing subpoenaed the Army officers and civilian personnel who had been in charge of the Army Base operation. Upon the evidence thus supplied and in the light of the observations of the Court of Appeals, the Commission concluded in 294 I.C.C. 203 that the Army was not entitled to allowances for wharfage and handling services.

It is evident, as shown in the long case history of the subject discussed above, that the same export rates apply in the many instances where the terminal services are not accorded as apply in the instances where they are provided. It follows beyond controversy, therefore, that the export rates are made without the inclusion of any factor for the terminal services and that such services are not paid for out of the export rates. The record abounds in testimony to this effect and Appellant's own witness expressed his accord. (R. 248-9, 251, 254) This no doubt is why Appellant at the outset of the case disclaimed any contention that the export rates

became unreasonably high under Section 1(5) when the terminal services were no longer provided. (R. 19) Since Appellant does not contend that the export rate tariffs specifically provide for wharfage and handling services, and likewise now concedes that the terminal tariffs, which contain the only existing reference to such services, are not applicable to the military traffic at the Army Base, it is clear that the railroads have no tariff obligation whatever to provide or pay for the wharfage and handling here sought.

Attention should be given at this point to the argument in Appellant's brief, particularly on pages 15 and 33-35, that the Commission erred in concluding that the granting of export rates to Appellant on the traffic in question was a concession rather than a right and that this concession did not cover wharfage and handling. Since the Commission also held that the terminal services were not included in the export rates in any event, it would seem immaterial whether the application of export rates to the Army's traffic was a matter of concession or right, but what the Commission obviously meant was that the fact that the Government received export rates to which it was not entitled under established tariff practices and procedures did not mean that the Army was entitled to be given a further concession in the form of wharfage and handling services. In other words, this was not export traffic in any usual sense, and the mere fact that the railroads voluntarily gave it the benefit of export rates did not convert it into the kind of traffic on which the railroads customarily provided wharfage and handling under the applicable tariffs. The question whether the Government was entitled to the lower export rates would be of more importance to the case if the Government had persisted in the contention set forth in its complaint that the export rates became unreasonably high under Section 1 (5) if not accompanied by the terminal services. In any event, however, it is clear that the Commission was correct in

its conclusion that the granting of export rates was a concession rather than a right. This is the only view consistent with the theory of export rates and the Commission's consistent line of decisions on the subject.

While this question, which has a voluminous literature, cannot be expanded upon in this brief, it will suffice to say that not all exported freight is entitled to export rates, that there is no "inherent right of traffic destined to a port for movement beyond by water, as such, to a rate lower than for local delivery to the port", *Alden Coal Co.* v. *Central R. Co. of New Jersey*, 256 I.C.C. 401, 414, and that export rates are applicable only within narrow limits as defined by tariffs. (R. 242-4, 293) One of the limitations of the export tariffs is that shipments must not leave the possession of the carier, i.e., that the continuity of the export movement must not be broken. Since the Army took possession of its export traffic, which, in the words of its own witness, lost "its original identity" (R. 168, 174), the Commission correctly held on the record in the instant case that the Army was not entitled to the export rates under the usual tariffs but only by reason of a special tariff provision made applicable in 1941 to Army Bases upon the "urgent request of the Secretaries of War and Navy". 289 I.C.C. 63 (R. 21) Cf. *Peden Iron & Steel Co.* v. *Texas & N. O. R. Co.*, 294 I.C.C. 741; *War Materials Reparations Cases*, 294 I.C.C. 5, 18, et seq. Other cases are to the same effect. Thus, in 1915, the Commission ruled in *United States* v. *Pennsylvania R. Co.*, 32 I.C.C. 730, that export rates were not applicable to shipments moving over a Navy Base, and in *M'Cormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I.C.C. 727 (1933), the Commission held that export freight coming into the possession of a shipper was entitled to neither the export rates nor the port services, and in fact it would be unlawful to accord them. That case was followed in *Rukert Terminals Corp.* v. *Baltimore & Ohio R. Co.*, 283 I.C.C. 5, 286 I.C.C. 485 (1952).

The requirement of continuity of movement, without break in carrier possession of the freight, referred to as the custody rule, is not only a policing measure, for which proof of exportation could be substituted, but it is an essential element of the definition of export traffic under the tariffs. Appellant's tariff expert admitted that other shippers would not be entitled to the export rates under the circumstances prevailing at the Army Base and that the Army's shipments qualified only because of the special tariff provisions. (R. 209, 211, 250)*

When the prior *Norfolk* case, frequently referred to in Appellant's brief, was reversed by the Court of Appeals, in *United States* v. *Interstate Commerce Commission,* 198 F. (2d) 958, the Court expressed the view that on the record then before it, the Commission was not justified in concluding that the wartime (1941) application of export rates to freight moving over Army and Navy Bases was a concession by the railroads, and the Court stated that it would have been *prima facie* unreasonable not to apply the export rates.** This expression of opinion was not essential to the decision in the case since the issue at hand was not whether the Government was entitled to the export rates, the Army shipments having been accorded export rates by special tariff provision, but rather whether the

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* Interveners do not agree with the statement in the footnote at p. 34 of the Brief for the United States. The Army shipments were not "bona fide export traffic" as defined in the tariffs and within the customary application of export rates. During World War I when it had taken over the railroads and was itself the principal shipper of all export freight, the Government did not regard military shipments as the kind of export traffic for which the export rates were designed and accordingly cancelled the export rates. (R. 244) Neither does the evidence support Appellant's statement that proof of exportation was furnished. (R. 322, 332, 342)

** The western railroads declined to make the export rates available on Army and Navy bases at Pacific Coast ports, and their action was upheld in *War Materials Reparation Cases,* 294 I.C.C. 5, 18 et seq.

existing export tariffs as such and without reference to the terminal tariffs entitled the Government to free wharfage and handling service. There is no holding by the Court of Appeals that the export tariffs had any such effect. Moreover, it is clear that, whatever deficiencies in the record in that case may have given the Court of Appeals the impression that any freight ultimately exported is *prima facie* entitled to export rates, the present record abundantly shows that this is a misunderstanding of the long-established theory of export rates. It may be noted again, moreover, that in the prior *Norfolk* case, after rehearing and the taking of further evidence as directed by the Court of Appeals, the Commission has again concluded that "complainant's traffic was favored in that it was accorded the export rates, which were not available to other shippers under the circumstances just described". See *United States* v. *Aberdeen and Rockfish R. R. Co.*, 294, I.C.C. 203.

2. The Commission's Conclusion That the Army Is Not Discriminated Against Is Supported by the Evidence

Section 2 of the Act requires the equal treatment of all shippers, including the United States, but equal treatment "under substantially similar circumstances and conditions.". There is an old philosophic saying to the effect that there can be no greater inequality than the equal treatment of unequals. That is not what the law requires and in this case Appellant seeks preferential rather than equal treatment. The Commission concluded that Appellant was treated exactly like other shippers in similar circumstances with respect to wharfage and handling in that such services are never accorded when a shipper takes possession of his freight on his own pier. The evidence is in agreement on this point and is supported by all prior rulings of the Commission with respect to the port practices. Indeed, Appellant's case before the Commission was presented with full recognition of the prevailing practice, and Appellant sought to bring its case

within the specific requirements of the terminal tariffs by arguing that the Army freight is handled over the public terminal operated by Stevenson & Young, Inc., as agent of the railroads. The Commission made factual findings to the contrary, holding that Army shipments are delivered into the possession of the Army on piers not operated as a public terminal.

The Commission concluded not only that the Army was treated like other shippers in this respect, but that it was treated preferentially in other ways, to wit, in that it was accorded the export rates and switching services which could not legally have been given other shippers. On pages 21 and 22 as well as elsewhere in its brief, Appellant states that "the only additional services required on Army freight were performed by the terminal operator after the railroads had completed their transportation * * * and that their performance imposed no additional burden on the carriers". This ignores, along with much other evidence, some eighteen printed pages of testimony (R. 229-236, 274-286) and six supporting exhibits showing that the Army required and received extensive additional services from the railroads in the form of extra switching and placing of cars, for which the railroads received no compensation whatever. Such preferential treatment would be unlawful if extended to a shipper other than the Government. Under Section 22 of the Act, however, preferential service to the Government is permitted but not required.

The preferential treatment thus accorded to the Government in the form of export rates and extraordinary switching service is not referred to here for the purpose of contending that the granting of concessions in these respects would justify any unlawful discrimination that might exist in other respects. It is mentioned rather for the purpose of emphasizing the groundless nature of Appellant's assertion that the additional services required on Army freight imposed no additional burden on the car-

riers. Even more importantly, the preferential treatment required and received by the Army is mentioned for the purpose of emphasizing how widely the Army's operation of its piers differed from the usual operations of a public or railroad pier and how exactly it resembled the operation of a private pier at which everyone, including Appellant's own witnesses, admitted there is no duty on the part of the carriers to provide wharfage and handling or pay shippers allowances therefor.

Appellant argues to the Court that the different "circumstances and conditions" surrounding its shipments are of no consequence, and that the facts (as admitted by Appellant's witness Farrell) that the Army takes possession of its shipments and disposes of them on its own terminal, instead of a public terminal, are not sufficient justification for any distinction. Certainly they are sufficient to show that no case can be made under Section 2 of the Act and similar facts have always been regarded by the Commission as sufficient to bar the port privileges from other shippers. See the *M'Cormick Warehouse* case, and other cases, *supra*.

The evidence is undisputed that the railroads pay no allowances to shippers for wharfage and handling services under any circumstances. Thus, Appellant has no case for discrimination in the matter of allowances as such. Appellant's argument that the railroads have never "physically performed" the services on the Army Base, that they pay the "charges" of the terminal operator, and that Appellant seeks only similar "allowances" is inaccurate and misleading. Actually the railroads perform the services, they do not pay charges except in the sense of absorbing the Belt Line charges shown in Exhibit 31 (R. 486), and they do not make allowances to shippers. In substance, they rent pier space and employ an agent to unload freight, but performance through an agent is no different from performance by employees. The compensation of their agent is fixed by agreement, and although measured by the amount of freight handled, the compensation could be fixed on

an annual or any other basis.* In other words, where the terminal tariffs provide any obligation at all, it is an obligation to furnish wharves and provide handling, not to pay shippers an allowance of $1.00 per ton or any other amount.

The railroads own some piers at Norfolk and they acquire the use of others, such as the Army Base. In both practical and legal significance, all are railroad piers alike. All shippers, including the Army, may take advantage of this service, but when they prefer to use their own piers they are not compensated by the railroads. In the same way the railroads unload certain export freight, using either employees or agents, but when a shipper unloads his own freight he is not compensated by the railroads. Appellant's attempt on page 36 of its Brief to distinguish *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U.S. 199, which establishes the right of a railroad to provide services without any obligation to pay allowances, is not sound. The railroads provide the warfage and handling services at Norfolk in the same way that they perform the icing services in the case cited, and Appellant asks to be compensated for supplying its own services for reasons similar to those advanced by the shippers in that case. In other words, it was to Appellant's advantage in connection with such things as the saving of storage charges, for example, to operate its own piers and handle its own freight just as it was to the shipper's advantage in the *Atchison* case to do its own icing. Otherwise, it obviously would not have done so. Certainly the railroads did not force it to. They were willing and able to perform the services within the terms of their tariffs.

To compel the railroads to absorb the cost of the services where the shipper elects to use his own piers and where

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* It is incorrect to say that the compensation to the railroad agent is paid out of the export rates, which would be true with respect to allowances to shippers. The payments are contractual obligations no different from the wages of train crews and bear no necessary relationship to freight rates. (R. 294, 301)

the railroads have no control over the costs, as Appellant seems to suggest on pages 17 and 40 of its brief, would indeed expose them to the "haphazard demands of individual shippers" as the phrase is used in the *Atchison* case. It is no answer to say that Appellant merely asks here for an allowance equal in amount to the compensation paid the railroad's agent. Any allowance due would necessarily be computed under Section 15(13) and while Appellant concedes that the railroad should not be liable for an allowance in excess of the compensation paid their agent (Appellant's brief, pages 23, 24), such compensation would not be a lawful method of computing an allowance under Section 15(13). For one thing, the amount of compensation paid Stevenson and Young presumably involved an element of profit to that organization and a shipper would not be entitled under Section 15(13) to any element of profit in an allowance.

In this case, the Army seeks to force the railroads to hire its piers and to employ it to unload Army freight. The least that can be said of this demand is that there is no precedent for it in the treatment of other shippers. The Commission has held that such a practice would be an unlawful rebate to commercial shippers. *M'Cormick Warehouse Co.* v. *Pennsylvania R. Co., supra.*

When the Court of Appeals considered the earlier *Norfolk* case, it was apparently much influenced in its consideration of the discrimination issue by the assumption that the Army had no alternative to the use of its own piers because other railroad facilities were inadequate. Apart from the fact that the Army had created that assumed situation by depriving the railroads of the use of the Army Base, the Court's assumption in this respect was reached despite the fact or perhaps because of the fact that the record, because of wartime secrecy, contained little or no evidence on the adequacy of railroad facilities. Upon rehearing, this deficiency in the evidence was supplied and, in its report of January 17, 1955, the Commission found that other railroad facilities were adequate during World War

II. *United States* v. *Aberdeen & Rockfish R. R. Co., supra.* There is no dispute as to the adequacy of railroad facilities in the instant case.

The determination of factual conditions justifying differences in service is a matter peculiarly within the province of the Commission. In *Barringer & Co.* v. *United States*, 319 U.S. 1, 6, which dealt with the loading of cars under certain conditions and the refusal of the railroads to load under other conditions, this Court said that the weighing of circumstances and conditions "is a question of fact for the Commission's determination". In *United States* v. *Wabash R. Co.*, 321 U.S. 403, 411, this Court said:

> "Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful. * * * * In any case findings of discrimination or undue preference under Secs. 2 and 3(1), as we have said, are for the Commission and not the courts."

Union Pacific R. Co. v. *Updike Grain Co.*, 222 U.S. 215, upon which petitioner relies, is not authority to the contrary. That case involved the enforcement of the Commission's order in *Nebraska-Iowa Grain Co.* v. *Union Pacific R.R. Co.*, 15 I.C.C. 90, in which the Commission found that differences in circumstances and conditions were not such as to justify difference in treatment. Thus, in the *Updike* case, the Court upheld the factual findings of the Commission on an issue of discrimination.

In order to bolster its argument, Appellant contends that it is entitled to preferential treatment under Section 6(8) of the Interstate Commerce Act:

> "In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the

transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

Reliance upon this provision is too insubstantial to deserve detailed argument. The words of Section 6(8) make it clear that the section applies to the physical movement of traffic and has nothing to do with the lawfulness of charges or the payment of allowances. There was no evidence of any failure of the railroads "to facilitate and expedite the military traffic". It is also to be noted that the Appellant has not suggested that the period since May 1, 1951, has been a "time of war or threatened war", nor has it shown any demand of the President.

3. The Commission's Conclusion That the Rates Paid by the Army Were Not Unreasonable Is Supported by the Evidence

The argument under Section 1 of the Act, whether directed to the unreasonableness of rates under Section 1(5) alleged in the complaint and later abandoned or to an unreasonable practice under Section 1(6) as urged in this Court, is based on the theory that the export rates include the port services and thus become unreasonable when the services are not performed and when the railroads decline to pay the Army the same compensation as paid to their agent. On this theory Appellant asserts that the Army paid for services not rendered.* The Commission concluded otherwise, noting that under the particular circumstances of this case any other shipper would not even have been entitled to the export rates, but would have been charged the higher domestic rates. Any other shipper would also have been charged for the additional switching the Army received without cost.

* Since the Army did not pay the published charges for wharfage and handling, Appellant is obliged to argue that the freight rates are inflated to include such services, contrary to the undisputed evidence.

The fact, and it is a factual matter, that the export rates include no element of compensation or charge for the port services was clearly proved and, indeed, was admitted by Appellant's witness. Any presumption that the level of rates is adjusted to include compensation for all services rendered in connection with such rates is overcome by the undisputed evidence in this case.

Appellant's tariff witness admitted that no obligation as to wharfage and handling can be found in the rate tariffs (R. 249-251), that the export rates are made without regard to these services (252-254), and that the line-haul carriers, which make the rates, do not offer the port services. (R. 248) The Commission so found and its finding is supported by evidence. (R. 237-239, 244) The level of the rates is not affected by the granting or withholding of the port services and export shipments which are not entitled to the services pay the same rates. (R. 220-222) Thus, the Army paid for no service it could not receive. If this were not so, the Chesapeake & Ohio Railway could not have participated in the line-haul rates since 1929, when the Commission decided the *Norfolk Port Commission* case, *supra,* without according the wharfage and handling services. Appellant's witness admitted that the Chesapeake & Ohio does not provide such services at the Army Base, even as to commercial traffic, although it charges the same export rates as the other railroads. (R. 208-212) In all of the prior Commission cases discussed in this Brief, the result would have been otherwise if the terminal services were paid for and were required to be included in the export rates.

As to wharfage particularly, it is obvious that the tariff provision making export rates applicable specifically to traffic *moving over Army Bases* could not imply that the railroads would furnish wharfage. Except for this provision, the Army shipments could not have been treated as export traffic. All of the export tariffs apply only to traffic "which does not leave the possession of the carrier", subject to a single exception affecting shipments handled direc-

tly from railroad stations to steamship docks with proof of exportation. The Court of Appeals in the previous *Norfolk Wharfage* case relied on this exception to the custody rule in its statement that it would have been *prima facie* unreasonable not to apply the export rates to Army shipments. If the exception had such effect, little would be left of the custody rule. Any shipper could take possession of his freight at the port, alter its character at will, and still claim the export rates upon proof of actual exportation. Appellant's witness admitted that the exception to the custody rule was available to the Army like any other shipper but was of no practical advantage. (R. 254) Moreover, it would not provide the services sought in this case since, of course, no wharfage or handling services would be available to a shipper who obtained the export rates by virtue of shipments moving from a railroad station to steamship docks. (R. 254-255)

Throughout its Brief, Appellant refers to export rates as "shipside" rates as if that term carried some special connotation with respect to wharfage and handling. However, Appellant point to no tariff provision defining the rates as "shipside" and, indeed, has not deemed it necessary to print any of the rate tariffs in the record on appeal, although they are part of the record below. The term "shipside" is not found in the tariffs of the northern lines (R. 244), which transport most of the Army Base shipments. (R. 191) The customary tariff provision is in the language quoted by the Commission (R. 17), which says that export rates are applicable to traffic delivered "direct to the steamer or steamers' docks", but it does not say that the railroads will provide the docks or unload the cars. Appellant's witness agreed that no obligation with respect to wharfage and handling can be found in the rate tariffs. (R. 249-251)

The tariffs of the southern lines include the term "shipside" rates, but this does not imply wharfage and handling, unless the services are specifically designated. (R. 314-

315) Appellant's witness explained that the term means either delivery of cars alongside ship or unloading freight to the piers, depending upon the undertaking held out in the terminal tariffs. (R. 202-203) Appellant characterizes the export rates as shipside rates only because the local terminal tariffs provide that the port services will be granted under the export rates subject to certain conditions, but Appellant disregards the conditions and implies that the obligation is a part of the rates themselves.

In *United States* v. *Aberdeen & R. R. Co.*, 294 I.C.C. 203, the final report of the Commission in the case reviewed by the Court of Appeals, the Commission discusses at length, beginning at page 218, the various reasons urged in support of the allegation of unreasonableness.* On evidence similar to that offered in this case, the Commission concluded that there was no violation of Section 1. The Commission is clearly correct in this matter. The export rates cannot possibly become unreasonable by virtue of the refusal of the railroads to pay for services not included in the rates in question.

4. The Commission Correctly Found That the Railroads or Their Agent Have No Duty to Unload Cars on the Army Base

It has already been shown elsewhere in this brief that no obligation to provide wharfage and handling on the Army shipments or to pay allowances in lieu thereof exists in any of the applicable tariffs and that the failure to perform such service or to pay an allowance to the Army in lieu thereof is neither discriminatory nor an unreasonable practice. A further reason why the railroads had no such obligation is found in the Commission's valid conclusion that the Army rendered impossible the performance by the railroads or their agent of wharfage and handling at the Army Base and this relieved the railroads of any further

* Appellant states that review of this case decided January 17, 1955, is still under consideration by the Government. Brief for United States, p. 8, fn. 3.

duty of performance they might otherwise have had or any liability for payment with respect to the services

It is clear that the Army imposed conditions on any handling obligations that might otherwise have existed that the railroads were not obliged to accept. These conditions were such as to distinguish the service demanded by the Army from any handling service rendered other shippers by the railroads, and thus, as previously shown, the railroads are not guilty of discrimination in refusing to perform the service in view of the lack of "similar circumstances and conditions". Moreover, when a carrier cannot perform a service at its "ordinary operating convenience", it is not obliged to perform the service nor need it make an allowance in lieu of performance. *Allowances or Divisions Received by Texas Gulf Sulphur Co.*, 96 I.C.C. 371, *Ford Motor Co. Terminal Allowances*, 209 I.C.C. 77, *Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, 30. Likewise,

> "When a carrier is prevented from performing the service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rate is discharged, and there is no obligation resting upon it to make an allowance to the industry for performing the service." *Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, 29.

The Commission concluded in the instant proceeding that the unloading service could not be performed in the customary manner by defendants, that customary railroad service would not be acceptable to the Army, and that consequently the railroads were relieved of any obligation that might otherwise exist. 289 I.C.C. 64-5. (R. 22, 24) When the Commission makes a finding of this character, it is deciding a question of fact, and its conclusion must be upheld if supported by evidence. Similar conclusions of the Commission, applying the rule quoted above from *Propriety of Operating Practices—Terminal Services*,

have been upheld consistently by this Court. *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402, *United States* v. *Pan American Petroleum Corp.*, 304 U.S. 156, *United States* v. *Wabash R. Co.*, 321 U.S. 403, *United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186. In the *Wabash* case, at page 408, the Court said:

> "In sustaining the Commission's findings in these proceedings, as in related case, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

See also *Interstate Commerce Commission* v. *Hoboken Manufacturers R. Co.*, 320 U.S. 368.

It is not significant that the railroads were unwilling to perform the service. The application of the rule as to termination of the carrier obligation does not depend upon the attitude of the carrier. See the *United States Smelting Co.* case, *supra*, at page 197. In any event, however, the railroads here were willing to provide any service for which they had an obligation. Their unwillingness extended only to the performance of the entirely different type of service originally requested by the Government and to the payment of allowances for which they had no obligation whatever.

The evidence supporting the conclusion of the Commission was supplied largely by Appellant's own witnesses. It was admitted that the railroads would be obliged to unload at Army convenience (R. 78) and that the Army would manage railroad operation. (R. 81) Appellant's witness Farrell described the complex method of handling Army freight (R. 177) and stated that he would not perform the work for the Army at the compensation received from the railroads. (R. 178-9) He testified that the difference between Army and railroad operation was not due to the volume of traffic but that special Army require-

ments made necessary its own operation of the Base. (R. 177-8) Some indication of the difference between the handling service ordinarily provided by the railroads and that required by the Army is shown by the difference in cost. (R. 198-9) The very nature of Army Base operation precludes any assumption that the terminal services could be performed in the normal manner, and that is why the Army declined to use the public terminal.

The foregoing discussion is based on the assumption that the railroads continued to have a duty to unload the Army freight after seizure of the piers by the Army, provided performance was not made impossible by conditions created by the Army. This assumption is unfounded, however, as no such duty existed, regardless of Army interference. As previously shown, the railroads hold out to unload export freight only when it does not come into the possession of the shipper, and such obligation as they have is limited to the performance of the service on public or railroad piers. The Army excluded its shipments from both of these categories and thus was in no position to demand the service in the first place. See *McCormick Warehouse Co.* v. *Pennsylvania R. Co., supra,* and the other cases noted above.

The Court of Appeals in the earlier *Norfolk* case said that the Army did not take over the Base and take control and possession of its shipments for commercial reasons and that the Army Base was not "private" in the usual sense of that term. But neither are the Army piers a public terminal, which is the established requirement for whatever obligation the railroads have for wharfage and handling, and during the period covered by this case there has been a public terminal on the Base where the free services are accorded. Furthermore, the Army had the advantages of freedom from railroad storage charges, which compensate the railroads for wharfage service, and freedom to deal with its freight in a manner not permitted on public piers. Appellant's witness testified that a shipper cannot touch its freight on a public terminal and that

the terminal's own freight is not unloaded by the railroads. (R. 168, 171-2, 175) In any event, as previously indicated, the reason for the rejection by the Court of Appeals of the public-private distinction in the earlier Norfolk case was that adequate public piers were not shown to be available, and the situation is otherwise in this case.

The final conclusion of the Commission was that the shipments involved were delivered to the Army Base on tracks designated by the Army itself and thereafter disposed of by the Army, thus terminating the transportation obligation. 289 I.C.C. 65. (R. 23) Placement of the cars on Army Base tracks short of the piers as directed by the Army constituted final delivery, cutting off any further obligation that the railroads might otherwise have under their terminal tariffs or under the line-haul rates. To a considerable extent, the railroads rendered switching service thereafter but this was a contribution that could not have been accorded to commercial shippers without charge. 289 I.C.C. 55. (R. 13) Under *United States* v. *American Tin Plate Co., supra,* and related case, this finding of the Commission disposes of the case, regardless of the other issues.

The question in *Propriety of Operating Practices—Terminal Services, supra,* and the other *Terminal Switching* cases was the same as that raised by Appellant, i.e., whether the shipper paid for more service than he received. See particularly the *United States Smelting Co.* case, *supra,* at page 194. It is irrelevant in this connection whether or not the tariffs contemplated more service. *Hanna Furnace Corp.* v. *United States,* 53 F. Supp. 341, 345; affirmed 323 U.S. 667. See also *Warehouse Co.* v. *United States,* 283 U.S. 501, 504, 507, 511. The determining question is whether the transportation obligation was terminated by final delivery. Furthermore, in determining what consfitutes delivery, the problem is no different under port rates from that arising under domestic rates. At some point the railroad's obligation ends and whether the

shipment is consigned for delivery to an industry or a steamship pier, the party entitled to receive the shipment may terminate the railroad's obligation by interposing to take possession. The rule applies to pier deliveries. *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U.S. 368; *Jarka Corporation of Baltimore* v. *Pennsylvania R. Co.*, 130 F. (2d) 804.

CONCLUSION

For the reasons stated in this brief, the judgment of the District Court should be affirmed and the appeal should be dismissed. On every point advanced by the United States the Commission made findings that are supported by substantial evidence. The Commission correctly applied the rules of law that have been established in its own previous reports and in the decisions of the courts. Under the established principles of judicial review this Court should not substitute its judgment for that of the Commission and set aside the Commission's order.

Respectfully submitted.

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No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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